SUPREME COURT, U. S.

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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN LOCKRETIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on three counts charging that he used a facility in interstate commerce with intent to promote the carrying on of a gambling enterprise which was unlawful under Indiana law, in violation of 18 U.S.C. 1952. On November 22, 1966, petitioner was sentenced to five years' imprisonment on each count, six months to be served and the remainder to

be spent on probation, the sentences to run concurrently; he was also fined $3000, $1000 to be paid annually. The court of appeals affirmed (Pet. App. 1-4).

The evidence, which was introduced by stipulation (App. 11-20),[1] showed that petitioner and one Oppolo were partners in the operation of the Forsythe Club in East Chicago, Indiana. The club conducted gambling activities, including a baseball pool involving the sale to individuals of tickets naming various professional baseball teams. Winners were determined by reference to the scores of baseball games being played on a particular day; the scheme was in effect a lottery. Petitioner contracted with Western Union to install a ticker tape machine at the Forsythe Club which would provide sports information. Baseball scores, taken from the ticker tape machine, were posted on a blackboard in the club for the benefit of customers. The sports information appearing on the machine was compiled by Western Union at its office in Chicago, Illinois, transmitted to East Chicago, Indiana, and then instantaneously to petitioner's establishment.

DISCUSSION

1. Petitioner contends that there was insufficient evidence that he "used" an interstate facility within the meaning of 18 U.S.C. 1952. However, the stipu-

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[1] "App." refers to petitioner's appendix in the court of appeals, which is on file with the Clerk of this Court.

lation showed that three F.B.I. agents and an independent witness observed scores being read from the ticker tape machine and immediately posted on a blackboard in the club (App. 14-18). The posting of the scores enabled a participant in the baseball pool to determine at an early point in time whether he had a possible winning ticket or whether he had definitely lost (App. 18). As the court of appeals pointed out (Pet. App. 2), the issue raised was settled by the almost identical case of *United States* v. *Miller*, 379 F.2d 483 (C.A. 7), certiorari denied, November 6, 1967, No. 519, this Term. The court in *Miller* stated (379 F.2d at 486):

> It is true that the baseball pool could have been operated without the ticker, but nevertheless the ticker was maintained to obtain results as quickly as possible for the gambling customers. Section 1952 does not require that the ticker be essential to the gambling operation; it need only "facilitate" the carrying on of the illegal gambling. As used in this statute, "facilitate" means "to make easy or less difficult". *United States* v. *Barrow*, 212 F. Supp. 837, 840 (E.D. Pa. 1962). * * *

2. Petitioner also contends that he lacked the requisite intent to be found guilty of violating 18 U.S.C. 1952. But Congress has expressly set forth what sort of intent is necessary to constitute a violation of the statute—an intent to promote an "unlawful activity", which is defined to include a business enterprise involving gambling in violation of the laws of the State in which conducted. Having concededly utilized inter-

state telegraph facilities with the intent of assisting his unlawful conduct in Indiana, petitioner acted with that type of guilty knowledge required by 18 U.S.C. 1952. On this point as well, the holding in *Miller* is dispositive (see 379 F.2d at 486-487; see also *United States* v. *Zizzo*, 338 F.2d 577, 580 (C.A. 7), certiorari denied, 381 U.S. 915).

3. Paragraph 1 of the stipulation (Pet. 3) provided that "public records, federal tax returns and federal tax stamp application[s] * * * would establish that [petitioner] was on [July 20, 1965] * * * a business partner of one * * * Oppolo in * * * the Forsythe Club, * * * and that he has remained a partner in that business continuously up to the present time." Paragraph 3 (Pet. 3) indicated that in June 1965 petitioner filed an application for a special wagering stamp listing himself and Oppolo as partners in the Forsythe Club. Petitioner contends that in view of the reference in these two paragraphs to his having applied for a federal wagering tax stamp, disposition of the instant case should be deferred pending decision by the Court in *Marchetti* v. *United States* and *Grosso* v. *United States*, Nos. 2 and 12, this Term, in which the constitutionality of the wagering excise tax and the related registration requirement is at issue.

However, as the court of appeals correctly concluded (Pet. App. 3-4), this case is not dependent upon *Marchetti* and *Grosso*. Here the stipulation established the fact of petitioner's partnership in the operation of the baseball pool from sources wholly

independent of any requirements of the wagering tax laws. Paragraph 2 provided (App. 12):

> If called to testify, Special Agents * * * of the Federal Bureau of Investigation would testify that the business carried on at the Forsythe Club * * * is comprised of gambling activities, including a baseball pool * * * and that such activities * * * were also the activities * * * conducted by [petitioner] * * * during the summer of 1965.

Moreover, the court of appeals noted that "the stipulation further established * * * that records of the Western Union Telegraph Company show that the defendant contracted with it for the supplying of the sports information by Western Union ticker" (Pet. App. 3-4). Thus, the court of appeals properly determined that "[n]o substantial right of the defendant is involved where, as here, the disclosure complained of was merely cumulative of other competent evidence and did not, even if erroneously admitted, prejudice defendant's right to a fair trial, particularly in the absence of a jury" (Pet. App. 4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1968.

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